LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 14 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962

No. 68

NATHANIEL WRIGHT, CHARLES L. SMART, RASCO WHITE, JAMES W. THOMAS, BENJAMIN CARTER, JUDSON FORD,
Petitioners,
vs.
STATE OF GEORGIA.

BRIEF

Of Respondent in Opposition to Granting of Writ of Certiorari to Review Judgment of Supreme Court of Georgia.

EUGENE COOK,
Attorney General of Georgia,
G. HUGHEL HARRISON,
Assistant Attorney General of Georgia,

P. O. Address:
132 State Judicial Building,
Atlanta 3, Georgia,

ANDREW J. RYAN, JR.,
Solicitor General, Eastern Judicial Circuit of Georgia.
SYLVAN A. GARFUNKEL,
Assistant Solicitor General, Eastern Judicial Circuit of Georgia,
Attorneys for Respondent.

P. O. Address:
Room 305, Court House,
Chatham County,
Savannah, Georgia.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

TABLE OF CASES CITED.

	Page
Cantwell v. Connecticut, 310 U. S. 300, 84 L. Ed. 1213-1220	12
Edelman v. California, 344 U. S. 357	11
Garner v. Louisiana, 7 Law. Ed. (2) 207, 216	11
Henderson v. Lott, 163 Ga. 326 (2) (136 S. E. 403)	10
Herndon v. Georgia, 295 U. S. 441	11
Michel v. Louisiana, 350 U. S. 91	11
Parker v. Illinois 333 U. S. 571	11
Staub v. City of Baxley, 355 U. S. 313	11
Wolfe v. North Carolina, 364 U. S. 177	11

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 729.

NATHANIEL WRIGHT, CHARLES L. SMART, RASCO WHITE, JAMES W. THOMAS, BENJAMIN CARTER, JUDSON FORD,
Petitioners,
vs.
STATE OF GEORGIA.

BRIEF

Of Respondent in Opposition to Granting of Writ of Certiorari to Review Judgment of Supreme Court of Georgia.

Respondent respectfully contests the statement of the question presented and the statement of facts as outlined by the petitioners. The petitioners have not given a sufficiently complete resumé of the record of the Brief of Evidence for the Court to determine the question of discrimination on account of race.

We respectfully bring to the Court's attention the testimony of the Police Officer who made the arrest (R. 51): "as a result of the conversation with this white lady we rode over to this Basket Ball Court we found around seven colored boys playing basket ball there on the Basket

Ball Court . . . As to their dress, they were pretty well dressed at that time; some of them had on dress shirts, some of them had on coats—not a dress coat, but a jacket. I didn't notice what particular type shoes they had on, as far as I know they didn't have 'tennis shoes' on. I am familiar with the type of shoes that people wear when they play basket ball, they didn't have that type of shoes on as well as I remember.

"I think that these defendants ranged in age from 23 to 32.

"There is a school nearby this Basket Ball Court, it is located at Washington Avenue and Bee Road, I mean, at Washington Avenue and Waters. There is another school on 44th Street—there are two schools nearby; I believe they are both 'grammar' schools. I patrol that area and the children from these schools play there, they come there every day I believe, I believe they come there every afternoon when they get out of school, and I believe they come there during recess. The school, I believe, gets out about 2:30 in the afternoon, and this was around 2:00 o'clock.

"When I came up to these defendants I asked them to leave; I spoke to all of them as a group when I drove up there, and I asked them to leave twice, but they did not leave at that time. I gave them an opportunity to leave. One of them, I don't know which one it was, came up and asked me who gave me orders to come out there and by what authority I came out there, and I told him that I didn't need any orders to come out there, I believe the one that asked me that is the third one there, sitting at the table in the Court Room here, the one there with the coat on, with the red button on it. The children from the schools, would have been out there shortly after that. The purpose of asking them to leave was to keep down

trouble, which looked like to me might start—there were five or six cars driving around the park at the time, white people. They left only after they were put under arrest, they were put under arrest approximately 5 to 10 minutes after I told them to leave—Officer Hillis is the one who put them under arrest—we called the police cruiser and it came and we put them in that. It seemed like to me that they were welcoming the arrests, because all of them piled into the car, Officer Hillis' car, at the time, and he had to stop them—Officer Hillis' car did not carry any of them, the cruiser carried them in, they waited in the car until the cruiser came, all seven of them, it was seven of them."

The State questioned the bona-fides of these defendants playing basket ball or whether they were there to try and create an incident. Further examination of the arresting officer revealed the following (R. 53):

"I believe that most of them had on dress pants, as far as I can remember. I have seen people playing basket ball, but I have never seen them come out dressed like that to play basket ball."

In regard to whether these defendants were arrested solely because they were negroes playing in a park in a white area, the arresting officer testified as follows (R. 53):

"There have been colored children in Daffin Park, but I did not arrest those children, but I arrested these people because we were afraid of what was going to happen. Colored children have played in Daffin Park, and they have fished there."

In order to develop what is the park playground policy, Carl Hager who identified himself as Superintendent of

the Recreational Department of the City of Savannah, was sworn and testified. We quote from the brief of his testimony (R. 54 and 55):

> "As superintendent I am over all of the playgrounds in the City of Savannah, Chatham County, Georgia; that includes Daffin Park and all the other parks that have playgrounds. These playgrounds are mostly in neighborhood areas. There are neighborhood areas where colored families live, and neighborhood areas where white people live, we try to establish them in that manner, and, then, there are certain areas where they are mixed to a certain extent. We have a playground in the Park Extension, and that is a mixed area for white and colored—a white section and a colored section—it is mostly white, but there are several colored sections within several blocks, and they are much closer now than they used to be. Wells Park is what we call a border-area and that is a mixed area—one side is colored and one side is white. The Daffin Park area, mostly around that area is mostly white. It has occurred, from time to time, that colored children would play in the Daffin Park area and in the Park Extension area, but no action has been taken, because it is legal, it is allowed, and nobody has said anything about it. I am familiar with the Daffin Park playground area, in fact, the office of the Recreational Department is in Daffin Park. That basket ball court is about a block from the office. I was advised that an arrest had been made, but they had all gone when I was told about it and I did know why the arrests had been made. The playground areas are basically for young children, say 15 to 16 and under, along that age group, we give priority to the playground to the younger children over the grownups, it made no difference as to whether

they were white or colored. Any time that we requested anyone to do something and they refused we would ask the police to step in, if we would ask them to leave and they did not we would ask the police to step in. We have had reports that colored children have played in the Park Extension but they were never arrested or told to leave.

"We have had grown people to come out to Daffin Park and play soft-ball; we have soft-ball diamonds and also younger people play on them, but we try to regulate the times for playing on the diamonds so that there will not be a conflict between the older people and the younger ones, and we issue permits in all cases where we think there will be conflict, we try to regulate them. We do not have the Tennis Courts regulated at the present time, they are now on first come first serve basis, but we plan to regulate these."

On cross-examination Mr. Hager said (R. 55):

"I testified that if there was a conflict between the younger people and the older people using the park facilities the preference would be for the younger people to use them, but we have no objections to older people using the facilities if there are no younger people present or if they are not scheduled to be used by the younger people."

He was also questioned as to whether they would allow colored citizens to play in a park in a white area. His answer was as follows (R. 56):

"It has been the custom to use the parks separately for the different races. I couldn't say whether or not a permit would or would not be issued to a person of color if that person came to the office of the Recreational Department and requested a permit to play

on the courts, but I am of the opinion that it would have been, we have never refused one, the request never has been made."

On further cross-examination he explained their rule in regard to age limits on basketball courts (R. 57):

"There is no minimum or maximum age limit for the use of basketball courts, however, at the present time we have established a minimum—a maximum age limit of 16 years for any playground area. Programming is not so readily understood by lay people, by age grouping is taken into consideration in programming because we don't want the older people competing with the younger people, and we don't like to have them associating because we don't think that a younger person should learn too much from the older person or vice versa, we don't think it conducive to good community relations, the building of character and the proper traits for younger people, and I think the school systems have followed somewhat the same procedure in segregating them in age groups, such as the younger school groups, the junior highs, and the high schools, and it is for the same purpose that we regulate our programs according to age groups and, sometimes, sexes also, and all of this is in accordance with, basically, a planned program."

On further redirect examination Mr. Hager explained the use of this particular playground at the particular time when the arrest was made (R. 57):

"On school days these courts and the playground area at Daffin Park are available for only certain age groups and they are only used at that time of day by the schools in that vicinity, it is, more or less, left available for them, that is the way we have our recreation set up."

Mr. Hager then on further redirect examination explained the pattern of arranging playground areas in various neighborhoods (R. 57):

"Most of our playground areas are arranged according to the families living in that particular area, playgrounds where there are white families and playgrounds where there are colored families—most of them are arranged in that manner according to the areas. We do feel this, that the playgrounds are established within a distance of one mile of the people who are expected to use them, and normally when we find that when a playground is established with that in mind that people who live within one mile of it will use it, so if we put one in a predominantly negro neighborhood, then, predominantly negroes would use it, and the same would be true for the whites, but, of course, we can't always control that because we do not have the choice of locations where we would like to have them, and that is the reason why some could very easily become mixed areas, such as Park Extension, because that is within a mile of both white and colored, and that is the reason why both play in that area.

"I don't know whether or not we have a planned program arranged for the day that these arrests were made, I would have to check my records. We do not have parks in colored areas that are comparable in size or comparable in facilities to Daffin Park, but colored boys do fish in the pond at Daffin Park. The size of the facilities would be determined by the area. Cann Park is probably our most complete area that is in a colored neighborhood, and on that we have a tennis court—and we use that court for basketball, we have swings, slides, [illegible]ft ball field, a small practice field, which is also used for football, and it also has

a concrete spray pool, picnic table, and a few other odds and ends of equipment, and it has a drinking fountain, and things of that nature, which would make it about as well equipped as any playground we have except for size."

The key question was then asked on recross-examination by defendants' attorney (R. 58), the question being "If your planned program did not have the 23rd of January 1961 set aside for any particular activity would it have been permissible to use this basketball court in Daffin Park in the absence of children?" The answer being as follows:

"I can't very well answer that question because you have several questions in one. First, I would like to say that normally we would not schedule anything for that time of the day because of the schools using the total area there and, second, I would not know whether we had something scheduled without referring to my records. Now if the schools were not there and were not using it and we had no program planned we certainly would not have been concerned about other people using it. The schools use the area during school hours. The Parochial School uses it during recess and lunch periods and also for sport, as also the Lutheran School, and the public schools bring their students out there by bus and at various times during school hours all day long, we never know when they are coming, and they use Cann Park the same way, I might add.

"If it was compatible to our program we would grant a permit for the use of the basketball court in Daffin Park to anyone regardless of race, creed or color, however, at that time of day it would not be compatible to our program. If that basketball court was not scheduled it would be compatible with our

program for them to use it, and we would not mind them using it. If there was a permit issued there would be no objections as to race, creed or color."

Officer G. W. Hillis, who was also with Officer Thompson, the arresting officer, at the time of the arrest, corroborated the statement of Officer Thompson (R. 60) as follows:

"I was on duty around two o'clock on the afternoon of the date in the vicinity of Daffin Park, here in Savannah, Chatham County, Georgia, at around that time I received some information from a white lady, as a result of that information I went with Officer Thompson, in a police automobile, to the basketball court in Daffin Park, here in Savannah, Chatham County, Georgia. When I arrived there I saw the defendants, they were playing basketball. Officer Thompson talked to them first, and then I talked to them. I asked them to leave, Officer Thompson had already asked them, I heard him ask them. They did not leave, and they did not stop playing until I told them they were under arrest. We called the wagon (cruiser). Officer Thompson told them that they would have to leave, he told them that at first, and they did have an opportunity to leave after he told them that. He asked them twice to leave, and then I asked them to leave after I saw they wasn't going to stop playing, and when I asked them to leave one of them made a sarcastic remark, saying: 'What did he say, I didn't hear him', he was trying to be sarcastic. When I told them to leave there was one of them who was writing with a pencil and looking at our badge numbers. They all had an opportunity to leave before I arrested them, plenty of time to have left, but I told them to leave, they wouldn't leave and I put them under arrest."

There was no evidence introduced by the petitioners that the testimony of the State's witnesses was incorrect or false. The question presented to the Court by the petitioners does not express a proper state of the record since the record shows that the defendants were not arrested solely for being negroes peacefully playing basketball in a public park customarily reserved for white persons.

The defendants were grown men ranging in age from 23 to 32 years of age who went upon a playground in a public park during school hours, dressed in dress shirts, dress pants and wearing leather shoes. At this time, the place was reserved for and had been used and was scheduled to be used by grammer school children from two nearby schools as part of their physical education program. The fact that these defendants were adult negro men on a children's playground in a white residential area and that cars were beginning to assemble all contributed to a fear that there would be a breach of the peace if the defendants continued to use the playground.

They were requested to leave, given every opportunity to do so but continued to play and to all appearances welcomed the arrests.

The petitioners give as the first reason for granting the writ that the Court below unreasonably refused to decide Federal questions which are properly reviewable by the Supreme Court. The Georgia Supreme Court held that under their rules the assignment of error on the judgment sentencing each defendant and on denial of their motion for a new trial which are the third and fourth grounds of the Bill of Exceptions were abandoned under the rule laid down in Henderson v. Lott, 163 Ga. 326 (2) (136 S. E. 403) and other cases cited in their decision. The petitioners argue that the point was properly raised and briefed. It has been held many times by this Supreme

Court that a State Court has the power to decide the proper method of preserving Federal questions and this determination will bind this Supreme Court. Herndon v. Georgia, 295 U. S. 441; Parker v. Illinois, 333 U. S. 571; Edelman v. California, 344 U. S. 357; Michel v. Louisiana, 350 U. S. 91. In all of these cases this Court deferred to a state court's determination of its own procedural rules.

We recognize that this Supreme Court will inquire into the adequacy of a decision on state procedural grounds to determine whether the procedural application involved was inconsistent with prior decided cases. We respectfully show that this was the question that was decided in Staub v. City of Baxley, 355 U. S. 313 which is cited by the petitioners. In that case the petitioner was able to show the Court that in other cases the Georgia Supreme Court had ruled differently in regard to the procedural rule that it used in the Staub case, the petition thus invoked a question of discrimination against Staub. In the recent case of Wolfe v. North Carolina, 364 U. S. 177, this Court again affirmed the doctrine.

Petitioners have not cited to this Court one Georgia case to show that the rule laid down in Henderson v. Lott, supra, has been inconsistently applied. We therefore feel that under the rules of this Court, this question has been finally disposed of in the Supreme Court of Georgia.

In sub-paragraph B, on reasons for granting the writ, petitioners state the Statute is in violation of rights granted by the Fourteenth Amendment on the grounds it was too vague to put them on notice that the acts participated in were criminal.

In the recent case of Garner v. Louisiana, 7 Law. Ed. (2) 207, 216 this Supreme Court held that: "We are aware that the Louisiana Courts have final authority to interpret and where they see fit, to reinterpret that state's

legislation." However, in that case the Supreme Court of Louisiana had not finally determined the question involved. That case also involved the interpretation of a breach of the peace statute. The Supreme Court also said at page 215: "We, of course are bound by a state's interpretation of its own statute and will not substitute our judgment for that of the state's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the findings of a state court."

To be guilty of violation of the Georgia Statute, three things are necessary: (1) There must be two or more persons assembled; (2) the purpose must be for disturbing the public peace or committing any unlawful act; (3) they shall not disperse on being commanded to do so by a Judge, peace officer, etc.

This Supreme Court has also held in Cantwell v. Connecticut, 310 U. S. 300, 84 L. Ed. 1213-1220 that:

> "One may be guilty of the common law offense of breach of the peace if he commits acts or makes statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended."

Thus it is not necessary to show whether the petitioners actually intended to create a threat of the breach of the peace to convict them. But it was necessary for the prosecution to show that more than one person was involved; that there was a threatened breach of the peace or an assembly for the commission of any unlawful act, and that they refused to disperse upon being requested to do so by the police officer. To make this act criminal under the Georgia Statute, all three of these facts must be present. The fact that they shall be given the opportunity to

disperse is an additional safe-guard to prevent a person from being arrested at the whim of a police officer.

We have quoted extensively from the Brief of Evidence in order to thoroughly show the Court the circumstances under which these arrests were made.

The petitioners have consistently tried to argue that the sole reason for their arrests was because they were negroes, and that no negroes would be allowed in the park. The uncontradicted evidence of the police officers showed that negro children had played in the park and had not been disturbed. The Superintendent of the Recreational Department of the city testified that negro children have played in Daffin Park and in the Park Extension and were never arrested or told to leave on the grounds they were colored. The recreational superintendent further stated the grounds for asking these defendants to leave was because they were adults and that priority for use of the playground was given to children over grown-ups, and it made no differences whether they were white or they were colored. The superintendent also stated if the basketball court was not scheduled, it would be compatible with their program for them to use it, and they would not mind them using it and there would be no objection raised as to race, creed or color. Yet in view of this sworn testimony, without a thread of evidence to prove that the witnesses were not telling the truth, these petitioners would have this Court believe that they were being denied the right to use this park because of their race.

What these petitioners would have this Court find is that they constitute a special group entitled to special privileges which other people, similarly situated, would not have. This Court has held that no one can be denied use of a public park because of his race, but certainly restrictions as to age without regard to race with a reason-

able explanation why such rules have been promulgated, can be enforced against these defendants in the same manner as they could have been enforced against any other adults who may have come upon the playground at the same time of day and refused to leave when requested to do so by police officers.

We respectfully request that the writ of certiorari be denied.

Respectfully submitted,

EUGENE COOK,
Attorney General of Georgia,

G. HUGHEL HARRISON,
Assistant Attorney General of Georgia,

P. O. Address:
132 State Judicial Building,
Atlanta 3, Georgia,

ANDREW J. RYAN, JR.,
Solicitor General, Eastern Judicial Circuit of Georgia,

SYLVAN A. GARFUNKEL,
Assistant Solicitor General, Eastern Judicial Circuit of Georgia,

Attorneys for Respondent.

P. O. Address:
Room 305 Court House,
Chatham County,
Savannah, Georgia.